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The Constitutional Right to a Preliminary Hearing in Louisiana

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THE CONSTITUTIONAL RIGHT TO A PRELIMINARY HEARING IN LOUISIANA

The preliminary hearing[1] is a pre-trial procedural device designed primarily for determining whether there is probable cause[2] to believe the defendant committed the crime for which he was arrested.[3] Louisiana courts have narrowly interpreted the right of the accused to a preliminary examination under the 1966 Code of Criminal Procedure.[4] Only recently, in *Gerstein v. Pugh*,[5] has the United States Supreme Court expanded the federal constitutional rights of all suspects to include a *probable cause* determination by a neutral magistrate pending disposition of their cases. Furthermore, the Louisiana constitution of 1974 provides that the right to a *preliminary examination* shall not be denied in felony cases except where the accused is indicted by a grand jury.[6] Thus, in some respects the new Louisiana constitution may go beyond the requirements of *Pugh*, while in other areas *Pugh* enhances the rights of Louisiana suspects.

Prior Louisiana Legislation and Jurisprudence

Prior to the enactment of the constitution of 1974, several provisions of the Code of Criminal Procedure governed entirely the defendant's right to a preliminary hearing in Louisiana. Under articles 228 and 229, a suspect must be promptly taken to the police station and

1. For brief historical accounts of the birth and evolution of the preliminary hearing, see Anderson, *The Preliminary Hearing—Better Alternatives or More of the Same?* 35 MO. L. REV. 281, 284-85 (1970); Weinberg & Weinberg, *The Congressional Invitation to Avoid the Preliminary Hearing: An Analysis of Section 303 of the Federal Magistrates Act of 1968*, 67 MICH. L. REV. 1361, 1365-78 (1969); Comment, 116 U. PA. L. REV. 1416-17 (1968); Note, 51 IOWA L. REV. 164, 165-67 (1965). *See also* Bennett, *The 1966 Code of Criminal Procedure*, 27 LA. L. REV. 175, 185-87 (1967) [hereinafter cited as *Bennett*].

2. Probable cause is a nebulous term susceptible of various formulations. There is substantial agreement that probable cause is less than proof beyond a reasonable doubt, but there is disagreement as to how much less. *See* Note, 48 SO. CAL. L. REV. 158, 161 n.19 (1974). The United States Supreme Court has given the following definition: "[facts] sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." Beck v. Ohio, 379 U.S. 89, 91 (1964).

3. *See Bennett* at 185.

4. LA. CODE CRIM. P. arts. 291-98 deal with the preliminary hearing.

5. Pugh v. Rainwater, 332 F. Supp. 1107 (S.D. Fla. 1971), *enforced*, 336 F. Supp. 490 (S.D. Fla. 1972), 355 F. Supp. 1286 (S.D. Fla. 1973), *aff'd*, 483 F.2d 778 (5th Cir. 1973), *cert. granted sub nom.*, Gerstein v. Pugh, 414 U.S. 1062 (1973), *aff'd in part, rev'd in part*, 95 S. Ct. 854 (1975).

6. LA. CONST. art. I, § 14.

informed of his right to request a preliminary hearing. Similarly, under article 230.1 the suspect must be brought before a judge within six days for the appointment of counsel, at which time he presumably will again be informed of his right to request an examination.[7] Article 292 required that the court immediately order a preliminary examination in felony cases upon the motion of the state or defendant if there were no grand jury indictment or if no information were filed by the district attorney; if there had been an indictment or an information, the granting of the hearing became discretionary.[8] Article 296 provides that if the defendant has been charged by an information, the court may still determine probable cause, but if an indictment has been filed, the preliminary hearing is limited to the perpetuation of testimony and the fixing of bail.

At the preliminary hearing, the prosecution must produce evidence[9] and the defendant is entitled to the presence of counsel,[10] compulsory attendance of witnesses, confrontation and cross examination.[11] Thus, although the primary purpose served by the preliminary examination is to insure that there is probable cause to believe an offense has been committed, in practice, the hearing may provide a most valuable discovery device to Louisiana suspects seeking to widen their limited access to criminal discovery.[12] Yet, the lower courts and the Louisiana supreme court have failed to recognize the full potential of the device,[13] despite the discretion afforded judges under articles 292 and 296 in determining whether to grant the hearing after indictment or information.[14] Indeed, when it has appeared

7. However, LA. CODE CRIM. P. art 230.1(D) provides that "[t]he failure of the sheriff to comply with the requirements herein shall have no effect whatsoever upon the validity of the proceedings thereafter against the defendant."

8. Article 292 was amended in 1974 to conform to the new constitution. Under the amended article, the right to a preliminary hearing is no longer cut off by the filing of an information by the district attorney. *See* text at notes 75-76 *infra*.

9. LA. CODE CRIM. P. art. 296 & comment (a).

10. *Id.* art. 293; Coleman v. Alabama, 399 U.S. 1 (1970).

11. LA. CODE CRIM. P. art. 294. *See also* Pointer v. Texas, 380 U.S. 400, 403 (1965).

12. *See* U.S. *ex rel.* Wheeler v. Flood, 269 F. Supp. 194, 197 (E.D.N.Y. 1967); *see also* Blue v. United States, 342 F.2d 894 (D.C. Cir. 1964), *cert. denied*, 380 U.S. 944 (1965). For illustrations of Louisiana's relatively narrow discovery, see State v. Lee, 264 La. 36, 270 So. 2d 544 (1972); State v. Migliore, 261 La. 722, 260 So. 2d 682 (1972). *See also The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Criminal Procedure I*, 34 LA. L. REV. 396, 423-26 (1974).

13. The Louisiana supreme court has described the role of the preliminary hearing as "designed primarily to determine whether probable cause exists to charge the accused." State v. Hudson, 253 La. 992, 1008, 221 So. 2d 484, 489 (La. 1969), *cert. denied*, 403 U.S. 949 (1971). *See also* LA. CODE CRIM. P. art. 296, comment (a).

14. Prior jurisprudence, relying heavily upon the discretion of the trial judge,

that discovery is the main purpose of the defendant's request, the hearing has been denied.[15] Such a limited view of the preliminary hearing ignores the modern concept of the proceeding as a device used almost exclusively for discovery purposes by defense counsel.[16]

The court's unsolicitous attitude toward preliminary hearings is reflected throughout the jurisprudence.[17] Two cases, *State v. Raymond*[18] and *State v. Hudson*,[19] narrowed the already limited statutory right to a preliminary examination when there is grand jury intervention. In *Raymond*, the Louisiana supreme court refused to grant relief to a defendant who was denied a preliminary examination, although the hearing had been requested and ordered before the return of a grand jury indictment and the defendant's request had been held in abeyance for almost a month.[20] As Justice Barham argued in dissent from the denial of writs, the court's action effectively writes out of the Code the article 292 requirement of an immediate preliminary examination by conditioning the defendant's right to a preliminary examination upon a prosecutorial decision not to place the matter before the grand jury.[21] One commentator has criticized *Raymond* on the additional ground that it limits the function of the preliminary examination to that of an alternative method of determining probable cause to hold the accused to answer for a crime, rather than allowing it to perform a valuable role as a discovery device.[22]

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rarely reversed a district court's refusal to order a preliminary hearing. Furthermore, the correctness of the ruling becomes moot once the verdict is signed unless the defendant can show a denial of rights resulting in some specific prejudice which made a fair trial impossible. To avert this dilemma, defendants have sought supervisory writs at the time of the denial. *See generally* State v. McCoy, 258 La. 645, 247 So. 2d 562 (1971).

15. *See, e.g.*, State v. Raymond, 254 La. 911, 228 So. 2d 312 (1969) (denial of writs); State v. Manuel, 253 La. 195, 217 So. 2d 369 (1968).

16. *See The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Criminal Procedure*, 31 LA. L. REV. 365 (1971) [hereinafter cited as *Sullivan*].

17. *See, e.g.*, State *ex rel.* Harvey v. Boudoin, 292 So. 2d 245 (La. 1974); State v. Doyle, 290 So. 2d 903 (La. 1974); State v. Eames, 260 La. 692, 257 So. 2d 152 (1972); State v. Pesson, 256 La. 201, 235 So. 2d 568 (1970); State v. Raymond, 254 La. 911, 228 So. 2d 312 (1969), *criticized in Sullivan, supra* note 16, at 365-66; State v. Hudson, 253 La. 992, 221 So. 2d 484 (1969), *cert. denied*, 403 U.S. 949 (1971), *noted in The Work of the Louisiana Appellate Courts for the 1968-1969 Term—Criminal Procedure*, 30 LA. L. REV. 309, 310 (1970).

18. 254 La. 911, 228 So. 2d 312 (1969) (denial of writs).

19. 253 La. 992, 221 So. 2d 484 (1969).

20. 254 La. 911, 228 So. 2d 312 (1969) (Barham, J., dissenting from denial of writs). A more recent case to the same effect is *State v. Monroe*, 299 So. 2d 795 (La. 1974) (Barham, J., dissenting from denial of writs).

21. State v. Raymond, 254 La. 911, 228 So. 2d 312 (1969) (Barham, J., dissenting from denial of writs).

22. *Sullivan, supra* note 16, at 365-66.

Although *Hudson* does not go as far as *Raymond*, it too represents a significant step in the "watering down"[23] of the code articles. When brought before the committing magistrate on May 22, 1967, the defendant requested and was granted a preliminary hearing which was ordered for June 2. Because the charge was pending before the grand jury on June 2, the hearing was continued until June 8.[24] A true bill was returned on June 7 and defendant received his preliminary examination, limited to bail, on June 30.[25] Reasoning that the brief continuance was not prejudicial to the defendant, the Louisiana supreme court found that the deferral to the grand jury did not violate the spirit of article 292, as both the grand jury and the preliminary hearing serve the function of determining probable cause.[26] The court further noted that the code did not require the prosecutor to present the same case in different forums at the same time.[27]

The jurisprudence has likewise accorded scant protection to the defendant's right to a preliminary hearing when interpreting the codal provisions governing the availability of preliminary examination after an information is filed. Article 292, which committed to the discretion of the trial court the decision whether to grant a preliminary hearing once a bill of information has been filed by the district attorney,[28] was apparently intended to apply only when the defendant's request for a preliminary hearing came *after* an information was filed.[29] However, several cases further narrowed the defendant's right to an examination by holding that an information filed even after a preliminary examination has been ordered defeats the right to such an examination as does a grand jury indictment.[30] Although these holdings were seemingly overruled in *State v. Jackson*,[31] they

23. This phrase was used by Justice Barham concurring in the granting of writs in *State v. Jackson*, 282 So. 2d 526, 527 (La. 1973), to refer to many of the court's recent holdings. *See, e.g.*, State v. Pesson, 256 La. 201, 235 So. 2d 568 (1970).

24. State v. Hudson, 253 La. 992, 1007, 221 So. 2d 484, 489 (1969).

25. *Id.*

26. *Id.* at 1009, 221 So. 2d at 490.

27. *Id.* at 1010, 228 So. 2d at 490. *But see* note 31 *infra*.

28. LA. CODE CRIM. P. art. 292, *as amended by* La. Acts 1974, Ex. Sess., No. 16, no longer gives the courts discretion to refuse to grant a preliminary hearing after a bill of information has been filed in a felony case. *See* text at notes 75-76 *infra*.

29. Before the 1974 amendment, article 292 provided in part: "*After* the finding of an indictment or *the filing of an information* an order for a preliminary examination in felony cases may be granted by the court. . . ." (Emphasis added.) *See also* Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 49 (1974) [hereinafter cited as *Hargrave*].

30. *E.g.*, State v. McCoy, 258 La. 645, 247 So. 2d 562 (1971); State v. Pesson, 256 La. 201, 235 So. 2d 568 (1970).

31. 282 So. 2d 526 (La. 1973). In *Jackson*, the supreme court ordered the trial

were recently partially exhumed in *State v. Marshall*,[32] where the defendant withdrew his first request for a preliminary hearing because a bill of information had been filed against him.[33] His later request for a hearing was refused and writs denied even though the defendant had been in prison for eight months.[34]

Gerstein v. Pugh

Gerstein v. Pugh[35] involved a challenge to a Florida information procedure, very similar to Louisiana's, by which an individual could be arrested and detained with no judicial determination of probable cause until arraignment, often as long as thirty days after arrest.[36] The plaintiffs, who filed a class action in federal district court on behalf of themselves and all others detained solely upon direct informations filed by the district attorney, sought declaratory and injunctive relief to require that they be afforded adversarial preliminary examinations. The district court held that under the fourth and fourteenth amendments the class was so entitled[37] and the Court of Appeals for the Fifth Circuit affirmed.[38] The United States Supreme Court held that the plaintiffs were entitled to probable cause determinations by a neutral magistrate, but not to preliminary examinations.[39]

The Supreme Court noted that the standards and procedures for arrest and detention had been derived from the fourth amendment and its common law antecedents[40] and that prior cases had unequivocally established that the criteria for a lawful arrest, *i.e.*, probable cause, must be determined by a neutral magistrate whenever possi-

judge to hold a preliminary examination after an indictment was returned. The hearing had been requested and ordered before the return of the indictment. Justice Barham, concurring, explained the court's decision as requiring that once a preliminary examination is ordered it must be held even though an indictment or information is filed in the interim. *Id.* (concurring in the granting of writs).

32. 284 So. 2d 778 (La. 1973) (denial of writs). *See also* State v. Monroe, 299 So. 2d 795 (La. 1974) (writs denied although facts were indistinguishable from *State v. Jackson*); State v. Renard, 296 So. 2d 833 (La. 1974).

33. 284 So. 2d at 778.

34. *Id.*

35. 95 S. Ct. 854 (1975).

36. *Id.* at 859. *See also* State *ex rel.* Hardy v. Blount, 261 So. 2d 172 (Fla. 1972).

37. Pugh v. Rainwater, 332 F. Supp. 1107 (S.D. Fla. 1971), *noted in* 25 VAND. L. REV. 434 (1972).

38. 483 F.2d 778 (5th Cir. 1973).

39. 95 S. Ct. 854, 869 (1975).

40. *Id.* at 861-62 *citing* Cupp v. Murphy, 412 U.S. 291, 294-95 (1973), *Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807), *Ex parte* Burford, 7 U.S. (3 Cranch) 448 (1806).

ble.[41] Although summary action by the state may be justified prior to arrest because the accused has a greater opportunity to escape apprehension during the time required to conduct a probable cause determination, this prime concern quickly evaporates after arrest and the suspect's need for a probable cause hearing increases significantly.[42]

Thus, the Court concluded that all arrestees, whether suspected felons or misdemeanants, have a constitutional right to a probable cause determination by a neutral magistrate.[43] Furthermore, though released pending trial, a defendant may find significant restraints on his liberty which affect his job, income, and family relationships.[44] Hence, the Court declared that the right to a neutral determination after arrest also applies to all suspects released on bail.[45]

Although *Pugh* established that a neutral determination is constitutionally compelled, it found that the adversarial safeguards of a preliminary examination are not, deeming them unnecessary to a reliable determination of probable cause.[46] Traditionally, the court

41. 95 S. Ct. at 862. *Cf.* Terry v. Ohio, 392 U.S. 1, 20-22 (1968); Johnson v. United States, 333 U.S. 10, 13-14 (1948).

42. 95 S. Ct. at 863.

43. *Id.* The Court apparently accepted the lower courts' holdings that there was no basis for distinguishing felons and misdemeanants. *Cf.* Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to counsel) *noted in* 33 LA. L. REV. 731 (1973), 47 TUL. L. REV. 446 (1973).

44. The Court explained, "Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint on liberty. When the stakes are this high, the detached judgment of a neutral magistrate is essential. . . ." 95 S. Ct. at 863.

45. An argument could be made, however, that the restraints which require the holding of the probable cause determination when a suspect is released on bond are of the same nature as those enumerated in 18 U.S.C. § 3146(a)(2), (5) (1966). *See* 95 S. Ct. at 863. The federal statute places restrictions on travel, association, place of abode and allows the judge to impose any other condition deemed necessary to assure appearance, including that the person return to custody after specified hours of release. The only condition imposed by Louisiana is the article 330 requirement that the defendant shall not leave the state without written permission of the court. If *Pugh* is interpreted to require the type of restraint listed in 18 U.S.C. § 3146(a)(2), (5) before the hearing is considered mandatory, it is arguable that article 330 imposes such a limitation because it is a restraint on travel. The better view, however, would be to consider restraints on liberty and employment significant enough to require the hearing.

46. 95 S. Ct. at 866. The Court distinguished *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), which held that a parolee has a right to a preliminary hearing at the place of arrest prior to revocation of his probation and return to prison. The Court reasoned that in addition to the usual function performed by the preliminary hearing, the hearing mandated in *Morrissey* served to gather and preserve live testimony which could be used at the final revocation hearing, often held some distance away from the place of arrest. Moreover, revocation proceed-

has approved more informal modes for determining probable cause, including ex parte proceedings.[47] For example, the fourth amendment requisites for issuance of a search or arrest warrant are satisfied when a police officer presents facts to a magistrate which evidence probable cause. Although confrontation and cross-examination might "enhance" the reliability of these determinations, "their value would be too slight to justify holding, as a matter of constitutional principle, that these formalities and safeguards . . . must be employed."[48] Nor is there a constitutional right to counsel at the probable cause determination as it is not a critical stage of the prosecution.[49] Furthermore, the deprivation of a probable cause hearing will not be grounds for a reversal of a subsequent guilty verdict.[50] Thus, if an independent determination of probable cause for arrest is made prior to the apprehension of the suspect, the requirements of *Pugh* are satisfied and there is no need for a subsequent determination following arrest.[51]

The result in the *Pugh* case, although sustainable upon a pure

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ings may offer less protection from initial error than more formal criminal process whereby violations are specifically defined by statute. 95 S. Ct. at 867. *But see* Comment, 48 So. CAL. L. REV. 158, 177-78 (1974).

For cases holding there is no constitutional right to a preliminary hearing at any time, see Robbins v. United States, 476 F.2d 26, 32 (10th Cir. 1973); Barber v. Arkansas, 429 F.2d 20, 22 (8th Cir. 1970); Walker v. Rodgers, 389 F.2d 961 (D.C. Cir. 1968); Sciortino v. Zampano, 385 F.2d 132, 134 (2d Cir. 1967), *cert. denied*, 390 U.S. 906 (1968); Dillard v. Bomar, 342 F.2d 789, 790 (6th Cir.), *cert. denied*, 382 U.S. 883 (1965); Odell v. Burke, 281 F.2d 782, 786 (7th Cir. 1960). *Cf.* Kerr v. Dutton, 393 F.2d 79 (5th Cir. 1968). For similar language in Louisiana, see State v. Manuel, 253 La. 195, 217 So. 2d 369 (1969); State v. Singleton, 253 La. 18, 24, 215 So. 2d 838, 839 (1968).

47. 95 S. Ct. at 866. *Cf.* McCray v. Illinois, 386 U.S. 300 (1967); Brinegar v. United States, 338 U.S. 160 (1949).

48. 95 S. Ct. at 867.

49. *Id.* The Court distinguished *Coleman v. Alabama*, 399 U.S. 1 (1970), which held that the Alabama preliminary hearing was a "critical stage" in the prosecution requiring assistance of counsel. The function of the hearing in *Coleman* was to determine whether to charge the suspect with an offense and the Court reasoned that an accused's defense on the merits would be compromised if counsel were not available to cross-examine the state's witnesses. In the *Pugh* procedure, however, the fourth amendment probable cause determination is addressed solely to pretrial custody and there are no witnesses to cross-examine. 95 S. Ct. at 867-68.

50. 95 S. Ct. at 865. Even if there is a finding of no probable cause after the hearing, there can nevertheless be a subsequent prosecution by information. *Id. Cf.* Lem Woon v. Oregon, 229 U.S. 586 (1913). *See also* note 14 *supra*.

51. 95 S. Ct. at 868-69. The Court noted that a grand jury indictment conclusively determines the issue of probable cause and hence satisfies the fourth amendment. *Id.* at 865 n.19. Nevertheless, it can be argued that the grand jury procedure is no more neutral than the information, since the grand jury is a lay body whose guidance comes from the prosecutor. *Cf.* Note, 25 VAND. L. REV. 434, 443 (1972); Note, 60 VA. L. REV. 540, 548 (1974).

fourth amendment analysis, ignores important due process rights of the defendant apart from the safeguards surrounding the arrest procedure. It is true that the *Pugh* neutral determination should suffice to justify initial arrest and detention; however, the Court failed to recognize the due process implications arising from the continuing restraints incarceration or even release on bond places on presumptively innocent suspects. The deprivation of liberty thereby occasioned should trigger a due process inquiry and, as the four concurring Justices[52] noted, it indeed seems anomalous to hold that one deprived of his liberty is entitled to fewer safeguards than those deprived of their property. However, after the *Pugh* decision, this disparity of protection can be seen in many instances.[53] The language of *Goldberg v. Kelly*,[54] which required an adversary hearing prior to termination of welfare benefits is particularly appropriate: "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss'. . . ."[55]

Clearly a criminal suspect suffers a deprivation that is at least as grievous as that sustained by plaintiff in the *Goldberg* case. Fundamental fairness would seem to dictate that a citizen who has been deprived of this liberty have an opportunity to confront his accusers or the police in a judicial setting as soon as possible after arrest.[56]

52. Justices Stewart, Douglas, Brennan and Marshall concurred in that part of the opinion which held that the Constitution clearly requires *at least* a judicial determination of probable cause, but felt that the rest of the opinion was dicta in that it specified what the Constitution did not require. Justice Powell believed that the issues were before the Court because Florida had prescribed what was required. 95 S. Ct. at 869 n.27.

53. *See generally* Goss v. Lopez, 95 S. Ct. 729 (1975) (temporary suspension of public school student); North Georgia Finishing, Inc. v. Di-Chem., Inc., 95 S. Ct. 719 (1975) (garnishing a commercial bank account); Fuentes v. Shevin, 407 U.S. 67 (1972) (Florida and Pennsylvania replevin statutes); Stanley v. Illinois, 405 U.S. 645 (1972) (custody hearings for unwed fathers); Bell v. Burson, 402 U.S. 535 (1971) (driver's license); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (prior hearing before notice could be posted preventing appellee from buying liquor); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (garnishment of wages). *See generally* Anderson & L'Enfant, *Fuentes v. Shevin—Procedural Due Process and Louisiana's Creditor's Remedies*, 33 LA. L. REV. 62 (1972); Note, 35 LA. L. REV. 221 (1974). Justice Powell believed that no analogy could be drawn from the above cases because the historical basis of the probable cause requirement is different from the recent application of the due process clause in debtor-creditor disputes. 95 S. Ct. at 869 n.27.

54. 397 U.S. 254 (1970).

55. *Id.* at 262-63.

56. *See* remarks of Dean Kenneth A. Pye in the *Hearings on the U.S. Commissioner System Before the Subcomm. on Improvements in Judicial Machinery of the*

Such fairness would also seem to require that the accused be given the opportunity to have counsel present at the hearing, to confront the state's witnesses and cross-examine them, and to compel the attendance of his own witnesses; the accused would thereby be able to test the soundness of the case against him and to better prepare his defense. At the same time, such a procedure would have the effect of dissuading the overzealous prosecutor from going forward with a weak case.[57]

The Louisiana Constitution of 1974

During the drafting of article I, § 14 of the new Louisiana constitution, the convention was aware of the Fifth Circuit's decision in *Pugh*[58] which held that there was a constitutional right to a preliminary hearing in all cases prior to the return of an indictment. While the convention rejected extending the right to all cases,[59] the constitution of 1974 does provide Louisiana felony suspects the right to a *preliminary examination* absent an indictment by a grand jury.[60] Thus, after the United States Supreme Court's decision in *Pugh*, the Louisiana arrestee suspected of committing a felony is assured a more comprehensive hearing under the state constitution than under the Federal Constitution. However, in two areas, *Pugh* is a vehicle for expanding the rights of Louisiana suspects. Because there is no state constitutional right to a preliminary hearing in non-felony cases, the legislature could presumably provide for the detention of suspects solely upon the basis of an information had *Pugh* not foreclosed this possibility by providing for at least a probable cause determination for all misdemeanants, a class not protected by the state constitution. *Pugh* also affords *all* suspects released on bail at least a probable cause determination.[61]

It may be unnecessary, however, for the suspected *felon* released on bail to resort to *Pugh* and its minimal procedural protection be-

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Senate Comm. on the Judiciary, 89th Cong., 2d Sess., 266, 270-71 (1966), *reprinted in* L. HALL, Y. KAMISAR, W. LAFAVE, J. ISRAEL, MODERN CRIMINAL PROCEDURE 846-47 (3d ed. 1969).

57. *See generally* Note, 25 VAND. L. REV. 434, 444 (1972).

58. 483 F.2d 778 (5th Cir. 1973), *noted in* Comment, 48 So. CAL. L. REV. 158 (1974); Note, 60 VA. L. REV. 540 (1974). For a discussion of the district court's decision see Note, 25 VAND. L. REV. 434 (1972).

59. *Hargrave* at 48-49 nn.256-57.

60. LA. CONST. art. I, § 14. For a discussion of Louisiana's new Declaration of Rights see *Hargrave*, *supra* note 29; Miller, *The Declaration of Rights: Criminal Provisions*, 21 LOYOLA L. REV. 43 (1975).

61. *See* text at notes 44-45 *supra*.

cause the broad language[62] of article I, § 14 could entitle him to a full preliminary hearing if the Louisiana courts draw an analogy to the United States Supreme Court decision in *Klopfer v. North Carolina*.[63] In *Klopfer*, the Court invalidated a state statute whereby the district attorney could obtain a *nolle prosequi* with leave allowing him to suspend the proceedings against the accused indefinitely without showing any justification.[64] The proceedings were not terminated because the prosecutor could have the case restored to the docket at will. Although the procedure allowed the defendant to go "whithersoever he will[ed]"[65] until the case was so restored, the Court reasoned that the right to a speedy trial afforded affirmative protection to the accused because there were still severe limitations on his liberty: the pendency of the indictment could subject him to public scorn, deprive him of employment and severely disrupt his social life.[66]

The *Klopfer* rationale could be applied to an accused free on bail awaiting a judicial determination of probable cause. The fact that he is "free" does not lessen the likelihood of public scorn or social disruption; thus, the state constitutional provision should be interpreted to allow the defendant access to all of the safeguards provided by preliminary examinations to determine probable cause as soon as possible after arrest. Providing an examination under these circumstances would be a significant step toward guaranteeing the accused his constitutional right to a speedy trial[67] as well as providing a check on prosecutorial discretion to go forward with the proceedings.

For the most part, the purpose and scope of the examination under the new state constitution continues to be the traditional one of judicial intervention to determine whether probable cause exists to hold an individual, instead of leaving that decision solely to law enforcement agencies.[68] The convention also viewed the preliminary hearing as a valuable tool in checking the discretion of local law enforcement agencies in the area of pre-trial procedure,[69] particularly

62. LA. CONST. art. I, § 14 provides: "The right to a preliminary examination shall not be denied in felony cases except where the accused is indicted by a grand jury."

63. 386 U.S. 213 (1967).

64. *Id.* at 214.

65. *Id.* at 222.

66. *Id.* at 222-23.

67. *Id.* at 223. The state also has a strong interest in holding a speedy preliminary examination, *i.e.*, to insure that its citizens are not arbitrarily deprived of liberty and needlessly subjected to humiliation and expense of a public prosecution. *See* Comment, 48 SO. CAL. L. REV. 152, 182-83 (1974).

68. *Hargrave* at 49 n.261.

69. *Id.*

since the general supervisory powers of the attorney general over the district attorneys are not as broad under the new constitution as compared to the 1921 constitution.[70]

While the delegates manifested no intention to expand the discovery function of the preliminary examination, they did envision adversary proceedings between state and defense,[71] and thus, the articles of the 1966 Code providing therefor[72] should be retained. Furthermore, article 296 which provides that a preliminary hearing after the return of an indictment is discretionary,[73] and, if held, is limited to the perpetuation of testimony and the fixing of bail, should also be retained as it conforms to the new constitution and may foster use of the preliminary hearing for discovery purposes.

It is clear that the state has the burden of furnishing the defendant a preliminary examination *if he requests it* because section 14 mandates that "the right shall not be denied. . . ." However, it does not seem to put any responsibility on the state to hold an examination absent a request by the defendant. Thus, if the defendant does not request the examination before trial, or even if he is improperly denied a hearing upon request, a subsequent guilty verdict would probably moot the issue.[74] Nevertheless, the decreased judicial and prosecutorial discretion under the new constitution in the granting of a preliminary hearing should improve defendant's chances of success in challenging an incorrect ruling through the use of the supervisory writs at the time of the denial.

Article 292 of the Code has been amended[75] to conform to the new constitutional provision and reverses the notion that the preliminary hearing is discretionary once a bill of information is filed by the

70. *Compare* LA. CONST. art. IV, § 7 *with* La. Const. art. VII, § 56 (1921); *Hargrave* at 51 n.272.

71. *Hargrave* at 49 n.263, 50 n.265.

72. LA. CODE CRIM. P. arts. 293-97.

73. *See* LA. CODE CRIM. P. art. 292 *as amended by* La. Acts 1974, Ex. Sess. No. 161 providing in pertinent part: "An order for a preliminary examination in felony cases may be granted by the court at any time . . . before or after defendant has been indicted by a grand jury."

74. *See* note 14 *supra*.

75. LA. CODE CRIM. P. art. 292, *as amended by* La. Acts 1974, Ex. Sess. No. 161:

"The court, on request of the state or the defendant, shall immediately order a preliminary examination in felony cases unless the defendant has been indicted by a grand jury.

"After the defendant has been indicted by a grand jury, the court may rescind its order for a preliminary examination.

"An order for a preliminary examination in felony cases may be granted by the court at any time, either on its own motion or on request of the state or of the defendant before or after the defendant has been indicted by a grand jury."

district attorney. The new constitution and codal provision firmly overrule the line of cases[76] which denied the statutory right to a preliminary hearing after an information was filed, although it had been ordered before filing. Thus, there is an absolute right to an immediate preliminary hearing in all felony cases except when an indictment has been returned by the grand jury.

Furthermore, the *Hudson* and *Raymond* cases are no longer controlling since the right to a preliminary hearing exists, "except when the accused is indicted by the grand jury." The fact that the grand jury is investigating the matter or is scheduled to do so should neither defeat the right nor influence the timing of the hearing.[77] In all cases in which the right is guaranteed, the examination should be held promptly after arrest to avoid prolonged incarceration without a judicial determination of probable cause in accordance with amended article 292 and the spirit of the 1974 constitution.[78] The explicit language of the new constitution should overcome any reticence the supreme court may have in affording suspects their right to a preliminary examination.[79]

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76. *E.g.*, State v. McCoy, 258 La. 645, 247 So. 2d 562 (1971); State v. Pesson, 256 La. 201, 235 So. 2d 568 (1970).

77. *See Hargrave* at 49. In light of the explicit language of LA. CONST. art. I, § 14, the second paragraph of amended article 292 should not be interpreted to reinstate the *Hudson-Raymond* holdings.

78. *See Hargrave* at 49 n.264.

79. *But see* State v. Perkins, No. 55,941 (La. S. Ct. March, 1975) in which the court denied writs, although the "preliminary examination" consisted of the testimony of one state's witness who, over defendant's objection, was allowed to relate hearsay and double hearsay in establishing probable cause. Noting that the Code does not provide for the type of hearing sanctioned by the majority, Justice Barham concluded that, "If the view expressed by the majority prevails, they have eviscerated one complete title from the Code of Criminal Procedure. . . . It is a usurpation of the legislative power and disregard of the people's new expression through the Constitution. . . . It is our obligation to apply that Constitution in every case where it does not conflict with or limit the rights and privileges guaranteed by the United States Constitution. . . . I am therefore hopeful that when this issue is presented again, this court . . . will follow the clear expression of law by statute and constitution." *Id.*